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No. 07-397

IN THE
Supreme Court of the United States

THOMAS D. ARTHUR,

Petitioner,

—*v.*—

TROY KING,
Attorney General for the State of Alabama,
in his official capacity, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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In its Opposition, the State of Alabama has "emphasi[zed]" for the Court's benefit that Mr. Arthur's Petition does not challenge the "validity or constitutionality of his conviction or sentence," and has erroneously asserted that Mr. Arthur "asks this Court to hold that he has a right to delay" his execution. (Opp. at 11–12.) The State thus does not merely mischaracterize Mr. Arthur's Petition; it also attempts to devalue it on the basis that it fails to seek relief that this Court has unambiguously held to be unavailable in cases such as this one. *See Heck* v. *Humphrey*, 512 U.S. 477 (1994). The questions Mr. Arthur asks this Court to resolve are neither improper nor presumptuous. Rather, Mr. Arthur asks that this Court provide much-needed guidance to lower courts and litigants regarding the contours of a death-sentenced inmate's right of access to DNA testing that could demonstrate his innocence.

To the extent that the State has not conceded the existence of a circuit split on the question of the limits on a death-sentenced inmate's right to bring claims under 42 U.S.C. § 1983, it has mischaracterized the relevant decisional law in an attempt to obscure the deep divisions among the Circuits. Further, the State encourages this Court to endorse the flawed reasoning and fact-finding that led the lower courts to conclude erroneously that the results of DNA testing would not bear on Mr. Arthur's culpability.

I. The Circuit Courts Have Adopted Conflicting Tests for Determining Whether § 1983 Actions Brought by Death-Sentenced Inmates May Proceed.

The State's contentions notwithstanding, Mr. Arthur's Petition establishes that there is nothing "illusory" (Opp. at 14) about the conflict among the Circuits regarding the appropriate standard to apply to a death-sentenced inmate's § 1983 complaint. To the contrary, the cases cited in the Petition make salient the divergence among the lower courts' treatment of such complaints.

A. The Ninth Circuit's Inquiry Differs Qualitatively from That of the Fifth, Eighth and Eleventh Circuits.

The State attempts to minimize the critical differences between the inquiry prescribed by the Ninth Circuit and that embraced by the Eleventh Circuit in evaluating death-sentenced inmates' § 1983 actions.[1] Its contention that the Ninth Circuit and the Eleventh Circuit apply the same "fact-specific inquiry" to such cases is belied not only by the analysis performed by the courts but also by the courts' affirmative statements as to what standards apply.

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[1] The State does not dispute, and thus apparently concedes, that a conflict exists between the Ninth Circuit and the Fifth and Eighth Circuits. Mr. Arthur does not abandon the argument that the Fifth and Eighth Circuits are aligned with the Eleventh Circuit and in conflict with the Ninth and Sixth Circuits on the issue presented in the Petition.

In *Beardslee* v. *Woodford*, 395 F.3d 1064 (9th Cir. 2005), the Ninth Circuit concluded that the district court erred in applying a "strong equitable presumption" against granting a stay of execution "solely on the basis that Beardslee had not filed the case until the California Supreme Court lifted its stay of execution." 395 F.3d at 1069. The Ninth Circuit stated that the district court erred by failing to conduct a "fact-specific inquiry to ascertain whether the claims could have been brought earlier, and whether the petitioner had good cause for delay." *Id.* at 1070.[2]

The Eleventh Circuit's decision embodies the same error that the Ninth Circuit identified in the district court's decision: contrary to the State's assertion, the Eleventh Circuit did not conduct any fact-intensive inquiry. The inquiry prescribed by the Ninth Circuit entails a careful weighing of equities, facts and competing interests; by contrast, the Eleventh Circuit's standard effectively forecloses any such weighing: the presumption that it imposes is, by its own terms and in practice, irrebuttable. *Arthur* v. *King*, No. 07-13933, 2007 U.S. App. LEXIS 22533, at *15 (11th Cir. Sept. 21, 2007) ("[E]quitable principles . . . *mandate dismissal* when the plaintiff delayed unnecessarily in bringing the claim, knowing full well that the discovery, evidentiary hearing, and

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[2] That the *Beardslee* court did not itself perform such "fact-specific inquiry," because it found that the complaint was properly dismissed on the merits, 395 F.3d at 1070, does not undercut the court's explicit holding, as the State implies that it does. (Opp. at 16 n.4.)

decision on the merits . . . could not possibly be accomplished within the short period of time between filing and the scheduled execution date.") (citations and internal punctuation omitted) (emphasis added); *see Williams* v. *Allen*, No. 07-13638, 2007 U.S. App. LEXIS 19836, at *9–11 (11th Cir. Aug. 21, 2007) (affirming dismissal solely on basis of finding of inexcusable delay). Indeed, the Eleventh Circuit held that "even if Arthur would have been entitled to a decision on the merits if he had brought his suit in time to allow consideration of the merits without the entry of a stay, the strong presumption against a stay [would have] operate[d] (Pet. at A55.) This Court should resolve the stark conflict between the Circuits in favor of the Ninth Circuit's standard, informed as it is by principles of justice, fairness, and equity.

B. The Sixth and Eleventh Circuits Have Applied Different Analyses Under Analogous Circumstances.

The State contends that, because the courts below did not address the application of the statute of limitations to Mr. Arthur's case, it is improper for Mr. Arthur to raise as an issue the Sixth Circuit's anomalous use of limitations periods in evaluating death-sentenced inmates' § 1983 complaints. By its very nature, a circuit split means that courts in other jurisdictions have applied a test that is different from that applied in the case at hand. Consequently, it makes no sense to require a petitioner to challenge in the courts below the tests applied in other circuits before presenting such circuit split to the Supreme

Court. The State's frivolous argument should be rejected.

It is beyond dispute that a statute-of-limitations rule is inconsistent with an equitable standard for measuring the timeliness of § 1983 complaints filed by death-sentenced inmates. In *Cooey* v. *Strickland*, the Sixth Circuit adopted a statute-of-limitations rule for determining the timeliness of § 1983 method-of-execution claims, holding that such claims accrue upon the conclusion of an inmate's direct appeal of his conviction. *Cooey* v. *Strickland*, 479 F.3d 412, 421–22 (6th Cir. 2007). The Sixth Circuit applied this rule under the precise circumstances presented in those cases where the "strong equitable presumption" against entry of a stay is applied, and explicitly grounded its approach in the equitable principles enunciated in *Hill* v. *McDonough*, 126 S. Ct. 2096 (2006), and *Nelson* v. *Campbell*, 541 U.S. 637 (2004), the opinions cited by other lower courts as the source of the "strong equitable presumption."

C. The Eleventh Circuit Alone Has Applied the "Strong Equitable Presumption" to a § 1983 DNA Access Complaint.

The State does not address, and thus concedes, the argument that certiorari review is warranted because *no* Circuit had applied the "strong equitable presumption" against the entry of a stay to a § 1983 action seeking post-conviction DNA testing before the Eleventh Circuit affirmed the dismissal of Mr. Arthur's Complaint, and no Circuit has done so since. This Court should grant certiorari to define

the applicability and contours of the "strong equitable presumption," and decide whether and how such a presumption may be extended from the method-of-execution context to the DNA access context. The latter context presents wholly different legal and equitable concerns, most urgent among which is that granting the relief sought could prevent the "constitutionally intolerable event" of an innocent person being executed. *Herrera* v. *Collins*, 506 U.S. 390, 419 (1993) (O'Connor and Kennedy, JJ., concurring).

II. In Relying on the Decisions of the Habeas Court, the Eleventh Circuit Failed to Recognize the Exculpatory Power of DNA Testing.

The State's Opposition quotes at length the factual findings of the habeas court underlying its ruling that favorable results of DNA testing could not help to establish Mr. Arthur's innocence. (Opp. at 27–30.) The courts below relied in part on some of these same findings in concluding that Mr. Arthur could not show a likelihood of success on the merits of his claims. *Arthur* v. *King*, 2007 U.S. App. LEXIS 22533, at *5–6, *17–18; *Arthur* v. *King*, Case No. 2:07-cv-319-WKW, 2007 U.S. Dist. LEXIS 61058, at *30 (M.D. Ala. Aug. 17, 2007).

Even assuming that it were proper to import such conclusions into an action in a different procedural posture and to which different legal standards apply, it is wholly inappropriate for a court adjudicating a motion to dismiss to rely on the findings of another tribunal as a substitute for an

independent determination as to whether results of DNA testing could undermine confidence in the trial outcome. Because the habeas court demonstrably failed to grasp the capacity of existing DNA data to identify as well as exclude suspects, and failed to understand the facts relevant to the pursuit of DNA testing, such reliance by the courts below was unwarranted.

A. DNA Testing Could Provide Powerful Evidence of Mr. Arthur's Innocence.

DNA databanks established on statewide and nationwide bases now give law enforcement officials the power to solve thousands of "cold cases," some of them decades old and with no other leads or suspects until a match in the databank points to the perpetrator. The FBI's Combined DNA Index System ("CODIS") integrates DNA profiles gathered at the state and local levels into a national DNA database containing millions of convicted offender DNA profiles and nearly 200,000 DNA profiles from unsolved cases, each profile consisting of a unique set of DNA identification characteristics.[3]

The existence of this integrated databank means that the exculpatory potential of the testing Mr. Arthur seeks is not merely speculative. For example, Short Tandem Repeat DNA testing of Judy Wicker's rape kit could prove Mr. Arthur's innocence by identifying the true perpetrator—even if merely

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[3] *See* CODIS, "National DNA Index System," at http://www.fbi.gov/hq/lab/codis/national.htm (last visited Oct. 8, 2007).

excluding Mr. Arthur could not conclusively prove his innocence. The results from Judy Wicker's rape kit could match a DNA profile of a convicted felon from the CODIS database, demonstrating that Judy Wicker was raped by someone who was previously convicted of a violent crime, and that this person fits the description of her husband's murderer that she provided during her own trial. Furthermore, DNA testing could demonstrate that the same person who raped Judy Wicker also physically assaulted her, that this person's blood was on her blouse, that his hair was found in the Wicker residence, and that this person was not Mr. Arthur. Not only can such testing exclude Mr. Arthur, redundant DNA test results—establishing the same genetic profile on multiple pieces of evidence—are critical to establishing the identity of the perpetrator of the crime. Thus, DNA testing could provide powerful evidence of Mr. Arthur's innocence by demonstrating that the same person, *i.e.* the real perpetrator, is the source of DNA on multiple pieces of evidence. The circumstantial evidence against Mr. Arthur cannot withstand such DNA test results.

B. A Denial of Access to DNA Testing Cannot Rest on Demonstrably Flawed Fact-finding.

Even aside from the exculpatory potential of DNA test results that went unrecognized in the courts below, the circumstantial evidence presented at Mr. Arthur's trial was weak and unreliable. The courts below not only gave undue credence to this evidence, but compounded the error by relying on the

habeas court's misstatements of the record, omissions, and errors.

For example, the State's Opposition quotes the habeas court's conclusion that "there is no basis in the record for [Mr. Arthur's] belief that the blood on [Judy Wicker's] clothing belonged to her assailant," because "the evidence was that [Judy] Wicker was assaulted from behind [and] did not struggle." (Opp. at 27.) The testimony at Mr. Arthur's third trial, however, does not support the conclusion that Judy Wicker was assaulted from behind. In fact, Judy Wicker testified that she saw the weapon used to hit her—"something nickel plated." (T.R. 773)[4] Moreover, the fact that Judy Wicker's clothing was torn and stained with blood suggests that there was a struggle. Therefore, there is no basis to exclude the possibility that the blood on Judy Wicker's blouse belonged to her assailant.

Further, the State's Opposition quotes the habeas court's statement that "[its] review of the published opinions and the transcript of Arthur's last trial did not uncover any testimony that Judy Wicker was raped or that she had sexual intercourse on the morning of her husband's murder." (Opp. at 29.) As the State is no doubt aware from earlier filings in Mr. Arthur's case, however, witness testimony at Judy Wicker's trial, and a forensic memo produced during the investigation of the crime, contradict this statement. A police officer who was among the first

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[4] "T.R. __" denotes references to the reporter's trial transcripts from the record of Mr. Arthur's third trial.

to arrive at the scene following the murder testified that Judy Wicker told him, "I've been raped"[5]; and a file memo of the Department of Forensic Sciences, Huntsville Division, regarding the rape kit collected from Judy Wicker on the day of the murder indicated that a "small number of spermatozoa" were identified in the vaginal swabs and slides collected. (Exs. 2 and 3 to Complaint.)

In addition, the State's Opposition quotes the habeas court's statements that "[Patricia] Green obtained .22 long rifle bullets for Arthur on the day before the murder" and that "the shell casings found at the scene were from .22 long rifle bullets." (Opp. at 30.) Nowhere, however, does the State acknowledge the unreliability of the testimony of Green, a convicted felon (*see* Pet. at 6); nor does the State note that criminologist Brent Wheeler testified at Mr. Arthur's trial that the spent shell casings were *either* .22 long *or* .22 long rifle, and that no expert matched this recovered bullet to any of the casings. (T.R. 406–07)

Most notably, the habeas court stated, and the State repeated in its Opposition, that Judy Wicker's veracity "was amply covered during the trial." (Opp. at 28.) The DNA testing that Mr. Arthur seeks to conduct, however, was not even available during Mr. Arthur's third trial. No matter how thoroughly Judy Wicker's credibility was tested in 1991, the truth of her testimony can be thrown into question or even disproved by the results of DNA testing. Indeed,

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[5] Testimony of Lanny Coan, transcript of Wicker trial, at 112.

DNA testing results have exonerated hundreds of people who were found guilty beyond a reasonable doubt—presumably based on evidence at least as credible as that provided by Judy Wicker.

It is beyond dispute that the State of Alabama has no valid interest in violating Mr. Arthur's constitutional rights. This Court should ensure that the perpetuation of error does not lead to such a result.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari and reverse the decision of the Court of Appeals for the Eleventh Circuit with respect to the questions presented herein.

Respectfully submitted,

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